No. 82-2056
IN THE

Supreme Court of the United States

October Term, 1983

ESCONDIDO MUTUAL WATER COMPANY, *et al.*,
Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, *et al.*,
Respondents.

On Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONERS.

PAUL D. ENGSTRAND,
DONALD R. LINCOLN,
HENRY E. HEATER,
JENNINGS, ENGSTRAND & HENRIKSON,
A Professional Law Corporation,
2255 Camino del Rio South,
San Diego, Calif. 92108,
(619) 291-0840,

LEROY A WRIGHT,
KENT H. FOSTER,
GLENN, WRIGHT, JACOBS & SCHELL,
2320 Fifth Avenue, Suite 300,
San Diego, Calif. 92101,
(619) 239-1211,

C. EMERSON DUNCAN II,
DUNCAN, ALLEN & MITCHELL,
1575 Eye Street, N.W., Suite 300,
Washington, D.C. 20005,
(202) 289-8400,

Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Does the Act of January 12, 1891, 26 Stat. 712, permit the Mission Indian Bands to veto the Commission's decision to relicense a federal power project by withholding consent to the continued use of reservation lands?

2. Does section 4(e) of the Federal Power Act permit the Secretary of the Interior to veto the Commission's decision to relicense a federal power project by imposing unreasonable conditions on the continued use of reservation lands?

3. Are Indian "water rights" a "reservation" within the meaning of section 4(e) of the Federal Power Act?

Parties to the Proceeding.

The Petitioners are the Escondido Mutual Water Company (Mutual), the City of Escondido (City) and the Vista Irrigation District (Vista). The Respondents are the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands); the Secretary of the Interior in his capacity as Trustee for the Bands (Interior); and, the Federal Energy Regulatory Commission (Commission).[1]

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[1]The term "Commission" refers to both the Federal Power Commission and its successor, the Federal Energy Regulatory Commission. (See 42 U.S.C. §§7101-7295)

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BRIEF OF PETITIONERS.

Opinions Below.

The Ninth Circuit Opinion is at 692 F.2d 1223. (PA 1-30)[2] The Order denying rehearing is at 701 F.2d 826. (PA 31-41) Commission Opinion and Order No. 36 is at 6 FERC ¶61,189. (PA 42-309) Commission Opinion and Order No. 36-A on rehearing is at 9 FERC ¶61,241. (PA 310-78) The Initial Decision of the Administrative Law Judge (ALJ) is at 6 FERC ¶63,008. (JA 243-368)

Statement of Jurisdiction.

The Ninth Circuit opinion was filed November 2, 1982. On March 17, 1983, the Ninth Circuit denied rehearing. Petitioners filed their Petition for Writ of Certiorari June 15, 1983. The Petition was granted October 17, 1983. The Court has jurisdiction under 28 U.S.C. §1254(1).

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[2]The following abbreviations are used:
(1) COR — the Certificate of Record — a listing of Commission documents filed with the Ninth Circuit in lieu of the record;
(2) NJA — the Ninth Circuit Joint Appendix;
(3) PA — the appendix to Petitioners' Petition for Writ of Certiorari; and,
(4) JA — the Joint Appendix in this proceeding.

Statutes Involved.

Statutes involved include provisions of the Federal Power Act (FPA),[3] 16 U.S.C. §791a, *et seq.* (PA 380-88), and the Mission Indian Relief Act (MIRA) Section 8. (PA 379-80)

Statement of the Case.

The issues[4] arise from the Commission's 1979 decision to issue a new license for Project 176 to Petitioners.

Project works include: the Escondido Canal, which conveys water from the San Luis Rey River (River) across the La Jolla, Rincon and San Pasqual Indian Reservations, and other government and private lands, to Lake Wohlford near Escondido; (2) Lake Wohlford Dam and Reservoir; (3) the Bear Valley powerhouse,[5] located on private land; and, (4) the Rincon powerhouse, located on the Rincon Reservation. The Pauma[6] and Pala Indian Reservations are within the River's watershed, but several miles from any Project works. (See PA 30 for a map of the Project)[7]

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[3]All section references are to the FPA. For parallel citations to the United States Code, see the Table of Authorities, *supra*.

[4]The controversy is being waged in two additional fora: (1) *Rincon, et al., Bands of Mission Indians v. United States*, Ct. of Claims, Docket 80-A (suit seeking damages for violation of Indian water rights); and, (2) *Rincon Band, et al. v. Escondido Mutual Water Co.*, S.D. Cal. Nos. 69-217-S, 72-271-S and 72-276-S (suits by Bands and United States seeking to void certain right-of-way and water contracts, damages and injunctive relief).

[5]Although in March, 1980, the Bear Valley powerhouse was destroyed by a mudslide, it has been reconstructed and is being expanded. See *Escondido Mutual Water Co., Project Nos. 176-013 and 176-014* (1983) 24 FERC ¶61,288 (Commission accepts Stipulation permitting reconstruction and expansion) An additional application to add a third powerhouse to the project is pending.

[6]The two Yuima tracts are under the jurisdiction of the Pauma Band, and contain no project works.

[7]Project No. 176 occupies approximately 1,200 acres. Of this, 87.4 acres (7.3%) are Indian Reservation land, 406.1 acres (33.8%) are other federal land, 662 acres (55.2%) are owned by Mutual, and 43.9 acres (3.6%) are other private lands over which Mutual has rights-of-way. (PA 51) When Vista's Henshaw Dam and reservoir are included the Indian reservation lands will comprise less than 2% of Project No. 176.

Background Facts.

Commencing in 1891, Mutual's predecessor, the Escondido Irrigation District, made several water filings on the River, and adopted a plan to divert its flow through the Escondido Canal to Lake Wohlford. (PA 49)

Because the canal would cross the newly patented La Jolla Reservation,[8] the District entered into a contract in June 1894 with the Potrero (La Jolla) Band or Village of Mission Indians which provided a right-of-way through the Reservation, and gave the La Jolla and Rincon Indians the right to tap the canal for water. The contract was approved by both the Office of Indian Affairs and Interior. (JA 9-13) The District's conduit and reservoir were completed by September 1895. (PA 51)

In 1905 Mutual acquired the District's assets, including its water rights and rights-of-way. (*Ibid.*) In March 1908, Interior granted Mutual a permit under the Act of March 3, 1891, former 43 U.S.C. section 946, which confirmed its rights-of-way across all federal land, including the La Jolla, Rincon and San Pasqual Reservations, for the Escondido Canal and appurtenant facilities. (NJA 472; PA 49 n.16)

Meanwhile, Interior realized that its proposed Rincon Indian irrigation system would require wells. (NJA 476) Because Interior needed power for pumping, its interests coincided with Mutual's plan to develop and distribute electric power. (*Ibid.*) In 1914 the United States, on behalf of

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[8]As early as 1875, some land had been set aside by Executive Orders for Indian reservations. (NJA 456 (La Jolla - 1875), 460 (Rincon - 1881), 2547 (Pala - 1875)) Following the passage of MIRA in January, 1891, each reservation was permanently established. In 1892 and 1893, trust patents were issued for the Potrero (La Jolla), Rincon and Pala Reservations. (See NJA 458 (La Jolla), 460-61 (Rincon), 2548 (Pala)) From 1891 to 1893, quitclaim deeds were obtained from private parties and the Pauma Reservation was established. (NJA 2556) In 1910, quitclaim deeds were obtained from settlers and the San Pasqual Reservation was patented. (NJA 465-66) Additional land later was added to each Reservation except La Jolla. (NJA 461-62 (Rincon), 467 (San Pasqual), 2548-53 (Pala), 2558 (Pauma))

the Rincon Reservation, entered into a contract with Mutual which: modified the 1894 contract; recognized and quantified Rincon water rights; gave Mutual rights-of-way across the Rincon and San Pasqual Reservations; permitted Mutual to erect and maintain the Rincon power plant; and required Mutual to provide the Indians with water through the power plant and power for pumping. (JA 22-27)

In 1914, Mutual applied for additional rights-of-way across federal lands pursuant to the Act of February 15, 1901, former 43 U.S.C. section 951, and the Act of March 4, 1911, former 43 U.S.C. section 961. In 1921 these applications were transferred to the newly-formed Commission. (PA 54)

Commencing in 1911 Vista's predecessor, William Henshaw, made water filings on the River. (PA 51)[9] In 1912 Henshaw obtained Mutual's consent to his dam. (PA 52) In June 1922 the United States, acting for the Indians of the Rincon and Pala Reservations, also consented. (JA 28-38)[10]

In September 1922, Henshaw conveyed Warner's Ranch and all of its water and related rights to the San Diego County Water Company. (PA 56) In November 1922, the Company entered into an agreement which permitted Mutual to purchase Henshaw-stored water and allowed the Company to use the Escondido Canal. (PA 56-58)

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[9]The filings were on Warner's Ranch at the site of what is now Henshaw Dam. (See map at PA 30) Henshaw had purchased Warner's Ranch around the turn of the century. The 43,402-acre ranch was confirmed against Indian claims. (*Barker v. Harvey* (1901) 181 U.S. 481; *United States v. Title Insurance and Trust Co.* (1924) 265 U.S. 472 (PA 51))

[10]In return for Henshaw providing flood control protection, recognizing Rincon and Pala water rights, and providing water and power guarantees, the United States agreed to "interpose no objection to the construction, maintenance and use of the said proposed dam and reservoir at 'Warner's Ranch' on the said San Luis Rey River, and diversion of the waters which shall be impounded therein." (JA 30)

The validity and effect of the June 1922 contract are issues in the other Court proceedings, *supra*, n. 4.

On December 25, 1922, the floodgates at Henshaw Dam were closed. (PA 58) In October 1924, Vista became the other major purchaser of Henshaw-stored water.[11] (PA 60)

Mutual informed the Commission of the November 1922 contract and was assured by its Executive Secretary, O. C. Merrill, that the contract did not conflict with the proposed license. (PA 59-60) On June 25, 1924, Mutual was issued a license for Project 176. (PA 60)

During the remainder of the original license term, it was amended several times to include project additions and betterments. (PA 61, 63) Mutual and Vista entered into additional agreements (PA 62, 63-64), and the City of Escondido commenced acquiring Mutual. (PA 65-66)

In 1971, Mutual applied pursuant to section 15(a), for a new license to operate Project No. 176.[12] The Bands and Interior intervened.[13] (PA 69-70)

The Bands sought a nonpower license under Section 15(b). Interior recommended federal takeover under section 14, or alternatively, supported the Bands' application. (PA 70-72) If those alternatives failed Interior sought the same result by imposing section 4(e) conditions which would make Mutual's operation of the Project ". . . resemble the operations under the non-power license or recapture alternative." (See JA 300)

On June 1, 1977, the ALJ issued his Initial Decision. (JA 243-368) He ruled that because power production was so incidental to the Project's major purpose — irrigation — the Commission lacked jurisdiction to relicense it; but, if

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[11]In 1946 Vista became the successor to San Diego County Water Company. It presently owns and operates Henshaw Dam, Lake Henshaw and Warner's Ranch. (PA 63)

[12]Since the original license expired in June, 1974, Mutual has operated the Project under annual licenses. (See, *e.g.*, 51 FPC 1610 (1974))

[13]The Order permitting intervention (46 FPC 253) also consolidated Mutual's relicensing application with Docket E-7562, a September, 1970 Complaint by Interior (PA 66-69) and Docket E-7655, an investigation of Vista's involvement in Project No. 176.

the Commission found jurisdiction, then a new fifty-year license should issue to Mutual, City[14] and Vista.[15]

On February 26, 1979, the Commission issued Opinion No. 36 (PA 42-309), and ruled, *inter alia*, that: it had jurisdiction over Project No. 176; a new license should issue to Petitioners; section 10(e) annual charges for the use of Indian lands should be substantially increased; and, the new license should be subject to additional conditions, including the delivery of water to the Bands.

The Commission granted rehearing and in Opinion No. 36-A (PA 310-78), ruled *inter alia*, that: Mutual's net investment was zero; if the Project were not relicensed to Mutual, it would not be entitled to severance damages; and, a new licensee need not assume Mutual's contracts. Opinion No. 36-A also modified the annual charges and clarified the requirement to supply the Indians water. Issuance of the new license was stayed for two years pursuant to section 14(b), so Interior could attempt to persuade Congress to authorize federal takeover.[16]

All parties except the Commission petitioned for review.

On November 2, 1982, the Ninth Circuit issued its decision. (PA 1-30) It affirmed the Commission's jurisdiction, but, held that: in addition to securing a federal power license, MIRA section 8 required petitioners to obtain rights-of-way for the Project from the Bands; section 4(e) required the Commission to include in the new license, any conditions proposed by Interior without regard to their reasonableness; and, Indian "water rights" were a section 4(e) "reservation."

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[14]In 1975, City filed an application seeking to become a joint applicant with Mutual. (NJA 3824-25)

[15]The importance of Henshaw Dam to the Project convinced the ALJ to include it as part of the Project works and make Vista a joint licensee.

[16]That stay expired without Congressional action. On November 20, 1982, the Commission issued a new stay pending completion of judicial review. (17 FERC ¶61,157)

All parties petitioned for rehearing, and on March 17, 1983, the Court denied rehearing. (PA 31-41)

Circuit Judge Anderson dissented. He wrote that: the majority's interpretation of MIRA section 8 "conflicts with the Federal Power Act's . . . pervasive scheme for obtaining rights-of-way over tribal land" (PA 34): the "legislative history [of MIRA] bears no indication that Congress intended Section 8 as the exclusive means of obtaining rights-of-way" (PA 34); the "[l]egislative history of the FPA is also at odds with our opinion" (PA 37); and, that "Sections 3(2), 4(e) and 10(e) of the FPA are express congressional authority for acquiring such property." (PA 39) He also "would place the initial reasonableness decision [respecting Interior's conditions] on FERC" and concluded that "FERC properly interpreted and applied Section 4(e) and that all of its findings in that regard are supported by substantial evidence." (PA 41)

On June 15, 1983, Petitioners filed a Petition for a Writ of Certiorari. Supporting amicus briefs were filed by: the Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts of the Flathead Irrigation Project, Montana; the Colorado River Water Conservation District and Kings River Conservation District; and, the American Public Power Association.

The Bands filed a Brief in Opposition, and the Solicitor General filed a Brief for the Federal Respondents (Interior and the Commission)[17] in Opposition. Following additional filings,[18] the Court granted the Petition on October 17, 1983. (JA 375)

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[17]In fact, the Commission did not oppose the petition, but requested the Solicitor General to file one. The Solicitor General obtained an extension of time to file a petition (see Orders dated June 6 and July 8, 1983, *Federal Energy Regulatory Comm'n v. San Pasqual Band of Mission Indians, et al.*, Docket A-970), but did not file one.

[18]On September 26, 1983, Petitioners filed a Reply Brief. The Bands subsequently filed a Motion seeking leave to file a Supplemental Brief responding to arguments raised in the Amici Briefs.

Summary of Argument.

The holding that MIRA section 8 requires Indian consent to the use of Mission Indian lands for federal power projects is wrong.

It overlooks Congress' plenary power over Indian lands and ignores the FPA's "specifically tailored scheme" for the use of such lands in the comprehensive development of the nation's water power.

The FPA's legislative history shows that Congress: (1) authorized the use of all Indian lands for power projects; and, (2) rejected any requirement of Indian consent. Later Congresses refused to impose a consent requirement and both Interior and the Commission have long interpreted the FPA as not requiring consent.

By ignoring the FPA's legislative history and longstanding administrative interpretation, the Court failed to properly harmonize it with MIRA. Because the FPA was intended to permit the use of Indian lands without Indian consent, it can only be harmonized with MIRA by not requiring such consent. This can be accomplished either by recognizing that MIRA does not require Indian consent to all uses of Mission Indian reservations, or that MIRA and the FPA are independent, alternative methods of obtaining rights-of-way across such lands.

If, as the Ninth Circuit held, MIRA requires Indian consent, then the FPA impliedly repealed it either by irreconcilably conflicting with the consent requirement or by totally occupying the field of water power development on Indian lands.

The Ninth Circuit similarly erred when it concluded that section 4(e) required the inclusion, without modification, of Interior's conditions in the new license. Its holding fails to give effect to the Act as a whole and ignores contrary legislative history and longstanding administrative interpretation. More importantly, it allows Interior to usurp the

Commission's overriding authority to license the project best adapted to beneficial public uses.

The Court's MIRA section 8 and section 4(e) holdings give the Bands and Interior a veto over Project No. 176. Its sweeping definition of "reservation" extends such vetoes over nearly every power project in the West. The Ninth Circuit's decision thus subordinates the greater public interest in water power development to narrow, parochial interests. It must be overturned.

ARGUMENT.

I.

THE FEDERAL POWER ACT AUTHORIZES THE USE OF MISSION INDIAN RESERVATION LAND FOR FEDERAL POWER PROJECTS WITHOUT INDIAN CONSENT.

The issue of Indian consent in this case can be resolved by answering two questions: (1) Does Congress have the power to dispose of Indian lands without Indian consent? and (2) If so, did Congress intend to exercise that power when it enacted the FPA?

A. CONGRESS HAS PLENARY POWER OVER INDIAN LANDS.

The Ninth Circuit majority ignored Congress' plenary power over Indian land. Instead, it began its analysis with a sweeping generalization respecting Indian sovereignty followed by the observation that "a tribe's title to its lands cannot ordinarily be extinguished without tribal consent." (PA 18) It then forced the FPA into the Procrustean bed of Indian consent.

Modern cases avoid reliance on "platonic notions of Indian sovereignty" and look instead to applicable treaties and statutes. (*McClanahan v. Arizona Tax Comm'n* (1973) 411 U.S. 164, 172.) Tribes may not exercise powers of autonomous states which are "inconsistent with their status." (*Oliphant v. Suquamish Indian Tribe* (1978) 435 U.S. 191, 208) Indian sovereignty exists only at the sufferance of Congress and is subject to complete defeasance. (*United States v. Wheeler* (1978) 435 U.S. 313, 323) Although one aspect of Indian sovereignty is the power to exclude non-Indians from Indian land (See, *e.g., Merrion v. Jicarilla Apache Tribe* (1982) 455 U.S. 130, 137), tribal sovereignty must give way to overriding national interests. (*State of Washington v. Confederated Tribes of the Colville Reservation* (1980) 447 U.S. 134, 153) Here, overriding national

interests would be frustrated by requiring Indian consent to the use of their land for federal power projects.

Congress has plenary power over Indian land and can authorize its use without tribal consent, and in abrogation of preexisting rights. (See, *e.g.*, *Cherokee Nation v. Southern Kansas Railway Co.* (1890) 135 U.S. 641 (Congress authorized a railroad right-of-way through an Indian reservation even though it violated the treaty establishing the reservation). Such right-of-way grants are effective even when the authorization act does not specifically mention the Indian reservation. (*Spalding v. Chandler* (1896) 160 U.S. 394) Congress need not specifically authorize by special enactment each particular taking of Indian land, but can delegate authority to administrative officers and agencies. (*Seneca Nation v. United States* (1964 2d Cir.) 338 F.2d 55, 56-57, *cert. denied* (1965) 380 U.S. 952)

The Ninth Circuit's reliance on *Wilson v. Omaha Indian Tribe* (1979) 442 U.S. 653, and *Cherokee Nation v. State of Georgia* (1831) 30 U.S. (5 Pet.) 1 (PA 18) is misplaced. Those cases construed the power of states and private persons to dispose of Indian land without tribal consent. It is clear that the federal government faces no such restriction. Its power over Indian lands is plenary.

B. IN ENACTING THE FPA, CONGRESS EXERCISED ITS PLENARY POWER OVER INDIAN LAND BY AUTHORIZING ITS USE FOR POWER PROJECTS WITHOUT INDIAN CONSENT.

The holding that, in addition to an FPA license, Petitioners must obtain the Bands' consent for rights-of-way across their reservations, pursuant to MIRA section 8 (PA 20), gives them a veto over Project 176. It is contrary to express congressional intent, and is inconsistent with long-standing administrative interpretation.

The Ninth Circuit majority ignored the FPA's comprehensive scheme for licensing federal power projects. Instead, it began and ended its analysis with an examination

of MIRA, an uncodified 1891 statute. By freezing time and events as of January 1891 (But *cf.*, *Scripps Howard Radio v. F.C.C.* (1942) 316 U.S. 4, 9 ("No court can make time stand still")), it concluded that Congress intended not only to bind its own hands[19] but those of future Congresses by providing an exclusive method of obtaining rights-of-way across Mission Indian Reservations.

The proper starting point of analysis is the FPA, not MIRA.

1. The FPA Authorizes the Use of All Indian Reservations for Federal Power Projects.

Federal Power Act section 4(e) empowers the Commission "to issue licenses. . . . upon any part of the public lands and reservations of the United States. . . ." (PA 381) Section 3(2) defines "reservation" to include "Tribal lands embraced within Indian reservations." (PA 380)[20]

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[19]In fact, the same Congress later enacted the Act of March 3, 1891, former 43 U.S.C. §946, which authorized Interior to grant rights-of-way through Indian reservations for reservoir and canal purposes without Indian consent. (See *United States v. Portneuf-Marsh Valley Irrigation Co.* (1913 9th Cir.) 213 F. 601; see also *IA Sutherland, Statutes and Statutory Construction* (4th Sands Ed.) §23.17 (Absent an irreconcilable conflict, two acts passed by the same legislature should both be given effect. However if they cannot be reconciled, the later statute will operate to repeal the prior statute.))

[20]In *Federal Power Comm'n v. Tuscarora Indian Nation* (1960) 362 U.S 99, 118, this Court emphasized the comprehensive nature of the FPA, stating:

> "The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See §4(e). It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians — tribal lands embraced within Indian reservations. *See* §§3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians."

The FPA embodies a detailed scheme for the use of Indian lands. Section 4(e) permits the Commission to license the use of tribal lands within an Indian reservation upon finding "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." (PA 381) Section 4(e) also states that licenses "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." (*Ibid.*) Section 10(e) permits the Commission to "fix a reasonable annual charge for the use" of "tribal lands embraced within Indian reservations" which charges are subject to periodic readjustment. (PA 383) Section 10(i) permits the Commission to waive most conditions for a minor project, but does not allow it to waive annual charges for the use of Indian lands. (PA 384) Section 17(a) requires all proceeds from Indian reservations to be placed to their credit.

Congress understood that the FPA authorized the use of Indian lands. An initial reference to Indians in the legislative history concerned proposed amendments to section 17(a) which would have eliminated the requirement that proceeds from Indian reservations be credited to the Indians. In opposing the amendment (which was rejected) Congressman Esch stated:

> "If *these proceeds are* put into the Treasury as miscellaneous receipts, they will be swallowed up and would not be permitted *to be used for the Indians whose lands are taken.*" (58 Cong. Rec. 2235 (1919)) (emphasis added)[21]

Later Senator Nugent pointed out that the FPA would authorize the use of both treaty and statutory reservations:

> "[T]he pending measure provides . . . [the] commission . . . power to issue licenses . . . *within* Indian

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[21]Emphasis is added unless otherwise indicated.

reservations that were ceded to the Indians by . . . treaty . . . [and] *within* Indian reservations generally — that is, Indian reservations that were granted to the Indians by act of Congress." (59 Cong. Rec. 1566 (1920))

2. The FPA Authorizes the Use of All Indian Reservations Without Indian Consent.

a. Congress Has Rejected the Requirement of Indian Consent.

During floor debate on the FPA, the Senate debated the following amendment to what eventually became section 4(e) of the Act:

> "That in respect to tribal lands embraced within Indian reservations, which said lands were ceded to Indians by the United States by treaty, no license shall be issued except by and with the consent of the council of the tribe. (59 Cong. Rec. 1534 (1920))

Senator Nelson stated: "I do not believe in that amendment. It would allow a few Indians to hold up an improvement; but I am willing that it shall go to conference." (*Ibid.*)

Later, Senator Walsh moved to reconsider the amendment, stating that he saw no reason to require Indian consent where their interests would be adequately protected by Interior. (*Id.* at 1564) He concluded: "There are obstacles enough in the way of the development of these power sites without submitting the question to a vote of the council of an Indian tribe." (*Ibid.*)

Senator Curtis supported the amendment, but conceded that Congress had plenary power over Indian lands: "It is true that the Supreme Court has decided that the Congress has a right to pass laws disposing of their property without their consent if it is thought for the best interest of the Indians. . . ." (*Id.* at 1565)

Senator Meyers opposed the amendment:

> "I think this amendment would be a most unfortunate, unfair, and unjust provision of law. I do not desire to be unfair to the Indians. . . . Neither do I think Indians

should be allowed to be unfair to other people; I do not think they should be entrusted with arbitrary and absolute power to be unfair and unreasonable to other people.

. . .

If this amendment becomes a law, it would be in the power of a tribe of Indians, arbitrarily and without any reason whatever, to block a project for water-power development so that it could never be established at all. They would have an absolute power of veto.

. . .

If there be on an Indian reservation where the land was ceded to Indians by treaty a site suitable for the development of water power which, if developed, would result in vast and untold good to the public, and if a little land be required for putting in the dam and erecting the plant, and for transmission lines, involving only a very small part of the Indian reservation — perhaps only a few acres out of millions of acres — according to this amendment it would be in the power of the tribe of Indians to block forever the undertaking. I think it unreasonable." (*Ibid.*)

Senator Walsh also emphasized Congress' plenary power:

"[T]he Congress of the United States represents the people of the entire country owning the remainder of the public land, and we are going to take their property and give the disposition of that property to the commission which is created by the bill, with power to issue a license which shall permit occupancy of the property; *but the matter of the Indians whose lands we are also charged with the disposition of is put in the hands of the commission too*. We treat them just exactly as we treat the entire people of the United States. . . . *The lands are subject to disposition by the Government of the United States through the Congress as guardians*

of these Indians." (*Id.* at 1568)[22]

The debate closed with Senator Curtis reading from *Lone Wolf v. Hitchcock* (1902) 187 U.S. 553, 566:

> "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand in the interest of the country and the Indians themselves, that it should do so." (*Id.* at 1570)

The amendment went to conference; but, was stricken from the bill because:

> "The conferees saw no reason why waterpower should be singled out from all other uses of Indian reservation land for special action of the council of the tribe." (H.R. Rep. No. 910, 66th Cong., 2d Sess. at 8 (1920))

The FPA's legislative history demonstrates that in enacting the FPA, Congress: (1) understood that it had the power to make plenary disposition of all Indian lands without Indian consent; (2) fully debated a provision that would have required Indian consent; and, (3) decided not to require such consent in the full knowledge that by so doing preexisting Indian rights might be abrogated in order to effect the overriding national interest in water power development.

Later Congresses also have rejected the requirement of Indian consent to the use of Indian land for power project

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[22]Thus, contrary to the Ninth Circuit's implication (PA 21 n.7), the FPA no more infringes on Indian property rights than on those of private citizens. It protects the rights of both. As Judge Anderson noted in his dissent:

> "[U]nlike privately owned property which a licensee may condemn under § 21, tribal lands within an Indian reservation may be used only upon payment of an annual rental charge. FPA § 10(e) . . . Congress intended FPA §§ 4(e) and 10(e) to be the counterparts in the tribal land sector to FPA § 21 in the private land sector." (PA 35-36)

His conclusion accords with this Court's analysis in *Federal Power Comm'n v. Tuscarora Indian Nation* (1960) 362 U.S. 99, 113, that section 10(e) is the functional equivalent of section 21 for acquiring Indian land.

purposes.

In 1948, Congress passed a general Indian right-of-way act, 25 U.S.C. §§323-328. Although the Act requires the consent of certain organized tribes[23] to rights-of-way "for all purposes" across their reservations, it exempts rights-of-way granted under the FPA.[24]

In its 1951 regulations implementing the Act, Interior also made it clear that the requirement of tribal consent was not to affect the Federal Power Commission's authority to license the use of Indian lands.[25]

In 1967, Interior proposed regulations which would have permitted it to grant rights-of-way across certain tribal lands without Indian consent. (See 32 Fed. Reg. 5512 (1967)) The proposal was reviewed by the House Committee on Government Operations. (See H.R. Rep. No. 91-78, 91st Cong., 1st Sess. (1969)) The Committee, in addition to urging that Interior not adopt the proposed regulations, recommended:

> "Consideration should be given to amending the Indian Right-of-Way Act to require tribal consent to *all* right-of-way grants of tribal land. . . ." (*Id.* at 4)[26]

The Committee report indicates that it knew there were a number of right-of-way statutes including the FPA that permitted the use of Indian lands without their consent. (*Id.*

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[23]See 25 U.S.C. §324.

[24]25 U.S.C. §326 provides:

> "Sections 323 and 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act. . . ."

[25]"The regulations in this part do not cover the granting of rights-of-way for primary hydroelectric transmission lines over and across tribal lands. Applications for such rights-of-way must be filed with the Federal Power Commission." (25 CFR §256.2(b) (1951), 16 Fed. Reg. 8578 (1951))

[26]The Committee proposed to amend 25 U.S.C. §324, to read as follows:

> "Sec. 2. No grant of a right-of-way and across any lands belonging to *any* tribe shall be made *pursuant to this or any other act of Congress* without the consent of the proper tribal officials. . . ." (*Id.* at 19)

at 19 n.17) It recommended amending the general right-of-way statute to require Indian consent in *all* cases. Although the Committee's recommendations regarding Interior's proposed regulations were heeded, its proposal to amend the general right-of-way statute was never accepted by Congress.[27]

b. The Commission Consistently Has Rejected Any Requirement of Indian Consent.

The Commission always has interpreted section 4(e) as empowering it to license the use of Indian reservations without Indian consent. (See *Pigeon River Lumber Co.* (1935) 1 FPC 206 (Commission can issue a preliminary permit for a project using tribal lands without Indian consent); *Lac Courte Oreilles Band v. Federal Power Comm'n* (1975 D.C. Cir.) 510 F.2d 198 (lack of Indian consent does not prevent the Commission from issuing an annual license for use of tribal lands); *Northern States Power Co., Project 108* (1980) 13 FERC ¶61,055 (lack of Indian consent does not prevent the Commission from relicensing a project using tribal lands)).[28]

The Commission's consistent and reasonable interpretation of its own Act is entitled to great deference. (See, *e.g.*, *American Paper Inst., Inc. v. American Electric Power Service Corp.* (1983) ___ U.S. ___, 76 L.Ed.2d 22, 38-39)

c. Section 4(e) Does Not Require Indian Consent.

Despite the FPA's legislative history and the Commission's consistent, contrary administrative interpretation, the Ninth Circuit majority read an Indian consent requirement

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[27]The Ninth Circuit majority's reliance on this same House report (PA 18-19) is misplaced. The House Committee recognized that Indian consent was *not required for all rights-of-ways, including those granted pursuant to the FPA; its proposal to make Indian consent a requirement was not accepted by Congress.*

[28]Interior itself has not always required Indian consent to the use of their lands in federal power projects. In 1938 it approved an amendment to Mutual's license even though the La Jolla Band would not consent. (See NJA 1387, 1388)

into section 4(e). Apparently relying upon certain dicta in *Lac Courte Oreilles Band v. Federal Power Comm'n* (1975 D.C. Cir.) 510 F.2d 198, 210-12,[29] it stated that section 4(e) "would be meaningless if Congress meant to extinguish preexisting Indian rights wherever they came into conflict with the Commissioner's comprehensive jurisdiction over power projects on federal lands." (PA 21)[30]

The lack of a consent requirement has not rendered section 4(e) meaningless. The Commission has not issued licenses where *it* found a project would interfere with or be inconsistent with a reservation. (See, *e.g., Southern California Edison Co., Project 120* (1977) 11 F.P.S. 5-416, 427 (the Commission found a transmission line project inconsistent with the 105-acre Cold Springs Indian Reservation where the proposed project would utilize 10.12 acres (9.7%) of the reservation); see also *Power Authority of the State of New York* (1959) 21 FPC 146, 147, *reh'g denied* 21 FPC 273,[31] *aff'd sub nom. Tuscarora Indian Nation v. Federal Power Comm'n* (1959 D.C. Cir.) 265 F.2d 338, *rev'd on other grounds*[32] (1960) 362 U.S. 99 (Commission majority

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[29]The majority stated that the issue of whether the Commission could relicense a project without Indian consent was "not ripe for review" (see 510 F.2d at 200, 210), but criticized the Commission's reasoning that the FPA had abrogated Indian rights under an 1854 treaty and instead indicated that in making any section 4(e) finding, the Commission must first assess Indian rights under relevant treaties and statutes. (*Id.* at 211-12)

[30]It is difficult to understand how the Ninth Circuit could reach such a conclusion when the FPA's legislative history (see discussion *supra*, 14-16) shows that Congress expressly decided to abrogate preexisting Indian rights to the extent such rights would permit them to withhold consent to the use of their lands.

[31]On rehearing the Commission refused to change its ruling, but indicated "A different size or location for the reservoir would greatly affect its relationship to the Indian lands, particularly as to the area and location of the land taken. . . . *We would then be free to consider whether a taking of Indian lands in the amount of any lesser acreage would be consistent with the purpose of the reservation.*" (21 FPC at 274; see also, 21 FPC at 175-76 (Hussey, concurring))

[32]The Supreme Court held that the land in question was not reservation land. Therefore, section 4(e) findings were not required. The Court then held that the FPA authorized the use of Indian fee lands despite lack of Indian consent. (362 U.S. at 119-22)

found that a project which proposed to flood 22% of a reservation interfered with its purpose).

Here, Project No. 176 occupies only 0.3% of the La Jolla Reservation, 0.7% of the Rincon Reservation, and 2.6% of the San Pasqual Reservation. The affected portions of the first two reservations have extremely rugged terrain "with little or no suitability for other uses." Use of the third reservation will be reduced substantially in the future. (PA 138 n.138) It is no wonder that the Commission, after assessing the Indian rights under MIRA and other relevant statutes (PA 155-68), found that the license as conditioned by *it* did not interfere with the purposes of these reservations. (PA 174, 176)[33]

II.

MIRA SECTION 8 DOES NOT REQUIRE INDIAN CONSENT TO THE USE OF THEIR LANDS FOR FEDERAL POWER PROJECTS.

It is clear that the FPA authorizes the use of all Indian lands, including Mission Indian Reservations, without the consent of the Indians affected. The question remains as to what effect should be given MIRA section 8. There are two options. The two statutes can be harmonized, or the FPA

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[33]The Commission's approach accords with that of Judge MacKinnon who dissented from the majority's dicta in *Lac Courte Oreilles Band:*

> "If section 4(e) is given an overly literal interpretation it would prevent the use of any lands in a 'reservation' (including tribal lands) in a power project, if . . . the purpose for which the reservation was created was to 'give sovereignty over tribal lands.' That might be stated to be the broad purpose behind the creation of every Indian reservation. *Thus no reservation lands could even be used in power projects.* Such interpretation, however, would be internally inconsistent with the remainder of the 4(e) provision [footnote deleted], and a number of other provisions in the Act, and the legislative history thereof, which definitely contemplate and provide for incorporating such reservation lands into federal power projects on proper terms. Probably, the congressional intent of 4(e) was to prohibit any use of land within a reservation that would substantially interfere with the purpose for which such reservation was created or acquired. But I would not express any final opinion on this phase of the case." (510 F.2d at 212)

can be found to have impliedly repealed MIRA section 8.

Because in enacting the FPA, Congress expressly rejected the requirement of Indian consent, MIRA can be harmonized with the FPA only by interpreting it as not requiring Indian consent to the licensing of federal power projects. If such consent is required, then the FPA irreconcilably conflicts with section 8 and necessarily repeals it.

A. THE FPA AND MIRA SECTION 8 CAN BE HARMONIZED WITHOUT REQUIRING INDIAN CONSENT.

MIRA can be harmonized with the FPA either by recognizing that MIRA section 8 doesn't require Indian consent to all rights-of-way across Mission Indian Reservations, or by recognizing that the two statutes are independent, alternative methods of obtaining rights-of-way across such reservations.

1. MIRA Section 8 Does Not Require Indian Consent to All Uses of Their Land.

MIRA section 8 was never intended to require Indian consent to the use of Mission Indian land for all purposes or by all persons. On its face, (PA 380) it arguably[34] only requires Indian consent for "citizens" and other *private* persons who want "to construct" certain "appliances for the conveyance of water."

Its enactment was in response to the attempts of various private companies and individuals to obtain rights-of-way for canal and railroad purposes across certain Mission Indian Reservations. (See Senate Ex. Doc. No. 118, 51st Cong., 1st Sess. 310 (1890)).

MIRA section 8 never was intended to apply to the federal government or its licensees. (cf. *Federal Power Comm'n v. Tuscarora Indian Nation* (1960) 362 U.S. 99, 119-22 (Court held that 25 U.S.C. §177 was not applicable to the United States or its licensees under the FPA)) In fact, the

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[34]The statute's operative word is "may" not must.

trust patents issued under MIRA to the Rincon, La Jolla and San Pasqual Bands contained the following reservation:

> ". . . there is reserved from the lands hereby held in trust for said [Bands] . . . *a right-of-way thereon for ditches or canals constructed by the authority of the United States.*" (NJA 1036 (La Jolla), 1039 (Rincon) and 1040-41 (San Pasqual)

Thus notwithstanding any consent requirement in MIRA section 8, the government reserved to itself the right to authorize canal right-of-ways across the Mission Indian Reservations without Indian consent.

2. The FPA Is an Alternative to MIRA Section 8 for Obtaining Rights-of-Way Across Mission Indian Reservations.

The Ninth Circuit majority erred when it interpreted MIRA section 8 "as the exclusive means by which a *private* party may obtain a right-of-way across reservations created pursuant to MIRA." (PA 34) Although in January 1891 Congress may have believed that MIRA was the only method of obtaining a right-of-way across Mission Indian Reservations, certainly it did not intend that it or a future Congress could not also legislate additional methods.

a. Congress Has Enacted Alternative Indian Right-of-Way Acts.

The Ninth Circuit majority implied that to be effective, any legislation subsequent to MIRA must either have specifically mentioned Mission Indian Reservations or expressly repealed MIRA section 8. It ignores the fact that Congress has enacted numerous alternative right-of-way statutes which provide rights-of-way for specific purposes across all Indian lands.

Within three months of MIRA's passage, the first of a series of general statutes was passed authorizing rights-of-way across government lands and reservations. (Act of March 3, 1891, 26 Stat. 1095, 1101, former 43 U.S.C. §946. (Interior authorized to grant canal rights-of-way through

public lands and reservations of the United States))[35]

The Ninth Circuit's analysis would render a nullity all such Congressional attempts to legislate general right-of-way acts governing Indian lands.

b. Interior Has Not Interpreted MIRA Section 8 as the Exclusive Means of Obtaining Rights-of-Way Across Mission Indian Reservations.

Although the 1894 contract was entered into pursuant to MIRA section 8 (see JA 14-17),[36] Interior relied on other statutes as authority for Mutual's 1908 permit and 1914 contract. It never mentioned MIRA section 8 with respect to the original licensing of Project 176 and subsequent amendments.

(1) *Interior Granted Mutual Its 1908 Permit Pursuant to the Act of March 3, 1891.*

In 1897 the Escondido Irrigational District signed an agreement with the Rincon Band for a canal right-of-way on terms nearly identical to the 1894 contract. (PA 49 n. 16). In 1898 Interior refused to approve the contract because

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[35]Subsequent Federal Acts included: the Act of March 2, 1899, 25 U.S.C. section 312 (rights-of-way for railroads, telegraph and telephone lines through Indian reservations); Act of February 15, 1901, 31 Stat. 790, former 43 U.S.C. section 959 (rights-of-way through public lands, forest, and other reservations of the United States including Indian reservations for generation and distribution of electrical power and for canals, reserves, etc.); Act of March 3, 1901, 25 U.S.C. section 311 (highway rights-of-way through Indian reservations); Act of March 3, 1901, 25 U.S.C. section 319 (rights-of-way for telephone and telegraph lines through Indian reservations); Act of March 11, 1904, 25 U.S.C. section 321 (rights-of-way for oil and gas pipelines through Indian reservations); Act of March 4, 1911, 36 Stat. 1253, former 43 U.S.C. section 961 (rights-of-way for transmission and distribution of power, etc. through public lands and reservations including Indian reservations); see also Act of June 25, 1910, 43 U.S.C. section 48 (reservation of lands within Indian reservations valuable for power or reservoir sites).

[36]The Irrigation District's first application for a right-of-way across the La Jolla Reservation was under the Act of March 3, 1891. (COR 26569) It was rejected by Interior because it had held in *Florida Mesa Ditch Co.* (1892) 14 Int. Land Dec. 265, that the Act was not applicable to Indian reservations. The District was then instructed by Interior to proceed under MIRA section 8.

it believed it to be detrimental to the Indians. Before the District could satisfy Interior's concerns, Interior notified the District that it could obtain a canal right-of-way under March 3, 1891 Act.[37] (COR 15925-32)

On March 25, 1908, Interior granted Mutual, as the District's successor, a permit under the March 1891 Act for its entire ditch line across all government land including the La Jolla, Rincon, and San Pasqual Reservations. (NJA 1399).[38]

(2) *Interior Relied on Other Rights-of-Way Statutes in Granting Mutual Rights-of-Way in the 1914 Contract.*

In 1914, Interior executed a contract with Mutual which: permitted Mutual to use Rincon and San Pasqual Reservation lands for power generation and transmission purposes; provided the Rincons with power at low fixed rates; and had other provisions relating to water. (JA 22-27)[39] In negotiating the contract Interior had indicated that Indian participation was unnecessary and "will tend to delay the matter". (See JA 20) In granting the rights of way for power it apparently relied upon the Act of February 15, 1901, former 43 U.S.C. section 959. (See NJA 1342-44)

(3) *Interior Did Not Refer to MIRA in Regard to the Issuance of the Original License for Project No. 176 and Amendments Thereto.*

In April 1924 Interior, in commenting on Mutual's proposed license, did not mention MIRA section 8 but instead replied that, as long as the license incorporated the 1914

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[37]In *Rio Verde Canal Co.* (1898) 27 Int. Land Dec. 421, Interior overruled *Florida Mesa Ditch, supra* and held that the March 3, 1891 Act applied to Indian Reservations. See also *United States v. Portneuf-Marsh Valley Irrigation Co.* (1913 D. Idaho) 205 F. 416, *aff'd* (1914 9th Cir.) 213 F. 601.

[38]The validity and effect of the 1908 permit are issues in the other Court proceedings, *supra*, n.4.

[39]The validity and effect of the 1894 and 1914 contracts are issues in the other Court proceedings, *supra*, n.4.

contract, it saw "*no reason for objection nor for the imposition of any additional conditions or charges upon the company on account of the occupancy of Indian lands.*" (NJA 1352)

Over the next fifty years Interior was constantly informed of the project's status, and asked whether additional conditions or annual charges were needed. (See, *e.g.*, NJA 1376, 1385, and 1389) In its replies, Interior never contended that MIRA required the Bands' consent. (See, *e.g.*, NJA 1387, 1388, 1391, and 1393)

(4) *Interior's Consistent Administrative Interpretation Is Entitled to Great Weight.*

From August 1898 until September 1970, Interior consistently indicated that the operative statute(s) governing rights-of-way over the Bands' reservations was not MIRA section 8, but rather the other right-of-way statutes mentioned above, *e.g.*, 43 U.S.C. sections 946 and 959 and the FPA. The Court should give great weight to the consistent construction of a statute by the executive department charged with its administration.[40]

The fact that Interior later changed its mind is not dispositive. (See, *e.g.*, *United States v. Leslie Salt Co.* (1956) 350 U.S. 383, 396 (Court refused to adopt Treasury's new *ad hoc* contentions and instead looked at its prior long-

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[40]See, *e.g.*, *California v. United States* (1978) 438 U.S. 645, 659 n. 15 and 676 n. 30 (Congress' intent under the Act of March 3, 1891, is reflected in Interior's contemporaneous administrative decisions and considerable weight must be accorded to interpretations of the Reclamation Act by the agency charged with its operation); *Chemehuevi Tribe v. FPC* (1975) 420 U.S. 395, 409-10 (longstanding consistent uniform construction by the agency charged with administration of the FPA which also involved contemporaneous construction of the Act by officials charged with responsibility of setting its machinery in motion held entitled to great respect and outweighed interests of Indian tribes in having Commission exercise its jurisdiction over thermal energy plants); *Udall v. Tallman* (1965) 380 U.S. 1, 18 (the practical construction given to an Act of Congress by those charged with executing it is entitled to great respect and if acted upon for a number of years will not be disturbed except for cogent reasons).

standing and consistent interpretation); see also *Bryant v. Yellen* (1980) 447 U.S. 352, 377-78 (Court gave apparent weight to Interior's earlier contemporary view that 160-acre limitation was not applicable to certain land.))

For over seventy years, Interior never viewed MIRA section 8 as the exclusive method of obtaining rights-of-way across Mission Indian lands. Instead it gave effect to other Acts, *e.g.*, the FPA, apparently viewing them either as independent, alternative methods of obtaining such rights-of-way, or as superseding MIRA section 8.

c. Courts Have Construed Apparently Conflicting Right-of-Way Statutes as Independent, Alternative Methods for Obtaining Rights-of-Way Across Indian Lands.

Several Courts have addressed the issue of which statute controls when two statutes provide for a right-of-way across Indian land, one requiring Indian or Secretarial consent and the other not. Each has harmonized the statutes by recognizing that each represents an independent, alternative method of obtaining a right-of-way. Each Court also gave effect to a statute permitting a right-of-way without Indian or Secretarial consent, notwithstanding the existence of another statute requiring such consent.

In *United States v. State of Minnesota* (1940 8th Cir.) 113 F.2d 770, the State brought an action under 25 U.S.C. section 357 to condemn an easement for a public highway over allotted Indian lands. The United States contended that 25 U.S.C. section 357, section 3 of the Act of March 3, 1901 (which permits condemnation without Interior's consent), had to be read in *pari materia* with section 4 of the same Act, 25 U.S.C. section 311 (which requires Interior's consent to the opening of public highways through allotted Indian land). The Eighth Circuit rejected that contention:

> "The statutes seem definitely to offer two methods of procedure for the acquisition of a right-of-way for public highway [sic]. . . . Thus it was made possible to acquire such a right-of-way by either of two methods,

> the Government having consented to each of these methods. So considered, each of these [statutes] is an effective and reasonable provision in the procedure for the acquisition of a right-of-way, neither dependent upon the other." (113 F.2d at 773)

See also *Nicodemus v. Washington Water Power Co.* (1959 9th Cir.) 264 F.2d 614, 618 (The Court held that an easement could be obtained pursuant to section 357 notwithstanding the fact that unlike section 323, it did not require either the Indians' or Interior's consent).[41]

Accord *Nebraska Pub. Power Dist. v. 100.95 Acres of Land*, No. 82-2042, slip op. (8th Cir. October 28, 1983); *Yellowfish v. City of Stillwater* (1982 10th Cir.) 691 F.2d 926, 929-30, cert. denied (1983) ___ U.S. ___, 77 L.Ed.2d 298; *Southern California Edison Co. v. Rice* (1982 9th Cir.) 685 F.2d 354, 357; *Transok Pipeline Co. v. Darks* (1977 10th Cir.) 565 F.2d 1150, 1153, *cert. denied* (1978) 435 U.S. 1006.

Here, Congress provided two independent methods of obtaining rights-of-way across Mission Indian reservations. In enacting MIRA section 8 Congress had in mind the needs of an irrigation company that wanted to build a canal on Mission Indian land. In enacting the FPA a more recent Congress envisioned a scheme for the comprehensive development of the nation's water power. With this purpose in mind it provided for the use of Indian lands for all purposes necessary for power development, including rights-of-way not only for water conveyance facilities but also for

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[41]The Court also rejected the argument that "section 357, . . . being a general statute, should not be construed in derogation of Indian treaty rights or the rights of Indians. . . ." (*Id.* at 617) The Court stated: "In our view, the test is the manifested intention of Congress, and not whether the statute be general or special." (*Ibid.*); see also *Rice v. Rehner* (1983) ___ U.S. ___, 77 L.Ed.2d 961, 978 (In refusing to apply the canon of construction which provides that state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided, the Court stated: "We have consistently refused to apply such a canon of construction when application would be tantamount to a formalistic disregard of congressional intent.")

transmission lines and reservoir and power plant sites.

Project No. 176 is a licensed federal power project. It is not the primitive irrigation project that Congress had in mind when it drafted MIRA. Under the circumstances the FPA should be viewed as the appropriate method of obtaining rights-of-way across Mission Indian reservations for this Project.

B. TO THE EXTENT THAT MIRA SECTION 8 REQUIRED INDIAN CONSENT TO POWER PROJECT RIGHTS-OF-WAY ACROSS MISSION INDIAN RESERVATIONS, IT WAS REPEALED BY THE FPA.

Assuming arguendo that MIRA Section 8 requires Indian consent to federal power project rights-of-way across Mission Indian reservations, Petitioners submit: (1) the FPA and MIRA irreconcilably conflict because in enacting the FPA, Congress expressly rejected any requirement of Indian consent to the use of their lands; and (2) the FPA was a comprehensive act which was intended to supplant the prior patchwork collection of primitive, restrictive statutes such as MIRA which had hindered development of the nation's hydro-power.[42]

1. The FPA Impliedly Repeals MIRA Section 8 Because It Irreconcilably Conflicts With It.

a. Congress Intended to Repeal All Acts Inconsistent With the FPA.

FPA section 29 contains an express general repealing clause which provides: "All Acts or parts of Acts inconsistent with this Act are hereby repealed." (PA 388) (See *United States v. Southern Power Co.* (1929 4th Cir.) 31

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[42]In *Posadas v. National City Bank* (1935) 296 U.S. 497, 503, the Court stated: "There are two well-settled categories of repeal by implication — (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."

F.2d 852, 858 (Interior's power to grant rights-of-way across forest lands pursuant to the Act of February 15, 1901 was repealed by section 29)); *Assignment of Hydroelectric Power Permits Affecting National Forest Lands* (1921) 32 Op. U.S. Atty. Gen. 525, 528 (Secretary of Agriculture's authority to approve the transfer of preexisting permits under Act of February 15, 1901 was terminated by the passage of the FPA); see also *Scenic Hudson Preservation Conf. v. Calloway* (1973 S.D.N.Y.) 370 F.Supp. 162, 165-67, *aff'd* (1974 2d Cir.) 499 F.2d 127 (Court held that although the FPA was not literally inconsistent with Rivers and Harbors Act, section 10, the legislative history clearly indicated that Congress intended to do away with piecemeal licensing of hydroelectric plants and that duplicative licensing violated the spirit if not the words of the Act.))

b. The FPA Irreconcilably Conflicts With Any Consent Requirement of MIRA Section 8.

Congress expressly rejected any requirement of Indian consent when it enacted the FPA. Its rationale was twofold:

(1) It did not want to give Indians the power to arbitrarily veto a power project that was in the greater public interest; and

(2) It was satisfied that any legitimate Indian rights were adequately protected by other sections of the FPA.

Against this backdrop, it is difficult to conceive of a more fundamental conflict than the Ninth Circuit majority's imposition of MIRA's Indian consent requirement on the FPA. That holding gives the Bands a veto over Project No. 176. This Court has, in analogous situations, consistently refused to give States a similar veto over the licensing of a federal power project.

In *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n* (1946) 328 U.S. 152, the Court rejected a State's claim that a license applicant had to comply with both the

FPA and a State permit requirement:

> "To require the petitioner to secure a state permit . . . as a condition precedent to securing a federal license . . . would vest in the [State] a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal Act. It would subordinate to the control of the state the 'comprehensive planning' which the Act provides shall depend upon the judgment of the Federal Power Commission." (328 U.S. at 164)
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> . . .
>
> "A dual final authority with a duplicate system of state permits and federal licenses required for each project, would be *unworkable*." (*Id.* at 168)

Accord *Federal Power Comm'n v. State of Oregon* (1955) 349 U.S. 435, 445.

Contrary to this Court's rulings the Ninth Circuit gives a small California Indian band a veto which even the State of California does not have.

2. The FPA Impliedly Repeals MIRA Section 8 by Totally Occupying the Field of Water Power Development on Federal Lands.

In *Utah Power & Light Co. v. United States* (1917) 243 U.S. 389, the Court compared two early statutes that provided for rights-of-way over public lands for ditches, canals and reservoirs (Revised Statutes sections 2339 and 2340) with a later act (Act of May 14, 1896, 29 Stat. 120) "which related exclusively to rights-of-way for electric power purposes. . . ." (243 U.S. at 406) The Court noted that the earlier acts "did not cover powerhouses, transmission lines or the necessary subsidiary structures" needed for a water power plant. (*Ibid.*) The Court held that the early acts thus were superseded by the later act because "[i]t dealt specifically with that subject [water power development], covered it fully, embodied some new provisions and evidently was designed to be complete in itself." (*Ibid.*)

The situation in this case is analogous. MIRA section 8 was an early attempt by Congress to allow the beneficial use of the Mission Indian reservations by permitting rights-of-way across them for certain purposes. "A farther-sighted Congress subsequently enacted the FPA." (PA 34-35) Its language, its legislative history, and this Court's interpretation of it, confirm that it was intended to be a comprehensive scheme for water power development, which superseded the numerous, restrictive, piecemeal acts preceding it.

a. On Its Face the FPA Evinces a Comprehensive Scheme for the Development of Water Power.

MIRA section 8 provides a method for obtaining rights-of-way only for certain "appliances for the conveyance of water. . . ." (PA 380) In contrast FPA section 4(e) empowers the Commission to issue licenses "for the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines or other project works necessary or convenient for . . . the development, transmission, and utilization of power across . . . or upon any part of the public lands and reservations of the United States. . . ." (PA 381)

For purposes of operating a power project on Mission Indian lands, MIRA section 8 is inadequate and necessarily was superseded by the FPA's later, more comprehensive scheme.

b. The FPA's Legislative History Demonstrates That Congress Intended It to Supplant Earlier Legislation.

The FPA was enacted in response to the widespread dissatisfaction of the power industry and the public with existing statutes relating to the use of federal lands. Some did not provide for adequate rights-of-way. Others only provided revocable permits or required a special act of Congress before any particular project could be built. Under the circumstances the power industry was unwilling to hazard the

necessary large investment in a power project which might be stalled by Congress or have its permit revoked.[43]

The FPA addresses each of those Congressional concerns. It provides for all necessary rights-of-way across all public lands and reservations. Its provisions for an initial 50-year term and possible relicensing thereafter removed many of the risks perceived by investors.

To the extent that MIRA section 8 can be construed as providing rights-of-way for water power projects, it clearly was superseded by the more comprehensive FPA.[44]

III.

THE COMMISSION MAY REJECT UNREASONABLE SECRETARIAL CONDITIONS.

The mandatory inclusion of Interior's conditions, without regard to their reasonableness, usurps the Commission's licensing authority. It fails to give effect to the Act as a whole; ignores contrary legislative intent; and, is inconsistent with longstanding administrative interpretation.

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[43]The Senate Report accompanying S.1419 highlighted some of these concerns. (S.Rep. No. 179, 65th Cong., 2d Sess. 2 (1917)).

In House hearings, Secretary of Interior Lane voiced similar concerns: "We had a statute, and have still, under which we grant revocable permits. The men who have money to invest in water-power propositions are not willing to invest them upon the hazard of the digestion of the Secretary of the Interior. They are not willing to allow any official to say when the investment they have made shall be thrown to the winds. The result has been we have stood for five years, and for a great deal longer, but for the five years of which I know, almost entirely without development of one of our great resources." (Hearings before House Water Power Committee, 65th Cong., 2d Sess. 446 (1918)); see also Pinchot, *The Long Struggle for Effective Water Power Legislation* (1945) 14 Geo. Wash. L. Rev. 9.

[44]Interior once agreed. (See "The Federal Water Power Act" (1920) 47 Int. Land Dec. 556, 557 (FPA provides "*a complete and exclusive method* for the use of public lands, reservations and navigable waters for the development, transmission, and utilization of hydroelectric power"))

A. WHEN READ AS A WHOLE, THE FPA EVINCES CONGRESS' INTENT THAT THE COMMISSION HAVE THE FINAL AUTHORITY TO MOLD A PROPOSED PROJECT INTO ONE BEST ADAPTED TO THE PUBLIC BENEFIT.

The holding that section 4(e) mandates the inclusion of Interior's conditions, without modification, ignores the meaning of the Act as a whole. Congress' overriding purpose in enacting the FPA was to replace earlier "piecemeal, restrictive [and] negative . . . federal laws" (*First Iowa, supra*, 328 U.S. at 180) with "a complete and comprehensive plan for the development . . . of electric power . . . upon the public lands and reservations of the United States. . . ." (*Tuscarora, supra*, 362 U.S. at 118)

The Act does permit individual secretaries whose reservations are used by a project to input their parochial concerns by recommending the insertion of conditions in a license to protect their reservations; however, it is the Commission that is charged with implementing the FPA's overall goal.

Under section 4(e), the *Commission* makes the final determination whether a license will "interfere or be inconsistent with the purpose for which [a] reservation was created or acquired." (PA 381) The *Commission* is charged under section 10(a) with exercising the final judgment "[t]hat the project adopted . . . will be best adapted to a comprehensive plan . . . for the improvement and utilization of water-power development, and for other beneficial public uses . . . ." (PA 382)

The Ninth Circuit overlooked section 6 which allows licenses to "be altered . . . upon the mutual agreement of the licensee and the *Commission*", and section 10(a) which gives the *Commission* "authority to require the modification of any project and of the plans and specifications of the project works before approval." (PA 382) Neither section

requires the concurrence of a secretary.[45]

Congress cannot be presumed to have written departmental vetoes into one section only to nullify them elsewhere. (See, *e.g.*, *American Textile Manufacturers Inst. v. Donovan* (1981) 452 U.S. 491, 513 ("we should not 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.' "))

B. THE FPA'S LEGISLATIVE HISTORY SUPPORTS THE COMMISSION'S INDEPENDENCE.

The Commission always has been the single agency responsible for national water power development. Although it initially was composed of three Secretaries (War, Agriculture and Interior), it later was reorganized as a five-person body, independent from the Secretaries, with its own staff. The FPA's legislative history and its amendments show that Congress never intended that one Secretary, either sitting as a member of the original Commission or later as a nonmember, could veto a licensing decision. (See, *e.g.*, remarks of Secretary of Agriculture Houston rejecting the notion that a particular secretary could veto a licensing decision, where a project's overall benefit to the public outweighed any perceived detriment to that Secretary's departmental interests ("Water Power", Hearings before the House Committee on Water Power, 65th Cong., 2d Sess. 678 (1918))

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[45]The Court also overlooked section 10(i) which permits the *Commission* in issuing licenses for a minor project, to "waive such conditions, provisions and requirements of this part [except the 50-year license term and annual charges for the use of Indian land] . . . as it may deem to be to the public interest . . . ." (PA 384) Thus, under the Ninth Circuit's holding, the Commission and the licensee are bound to accept departmental conditions, which they may later negate or waive without departmental approval.

Project No. 176 is a minor project (PA 69 n. 49) and the Commission expressly waived certain minor conditions. (PA 221-23) Although the Commission understood that it also had the power to "invoke section 10(i) to waive section 4(e)," it chose not to (PA 137), and instead modified Interior's conditions or rejected them as it deemed in the public interest. (PA 143-55)

It was known that conflicts would arise, but as Secretary Houston stated:

> "All such differences can easily be adjusted by [the] commission, or board. . . . They can define their policies and *adjust such differences in their regular or called meetings*." (*Id.* at 677)

It is just not sensible, when looking at the whole scheme — to create a *Commission* of three to coordinate national water power development — to believe that Congress, either intentionally or by inept language, chose to give one member of the Commission a veto.[46] Coordinated action would thus be frustrated by singular action.

Prior to 1920, each Secretary had autonomy; after 1920, each Secretary had one vote, but the Commission had the ultimate authority to decide.

By 1930 the Commission workload had so increased that it was deemed desirable to have a full-time Commission, independent from the Secretaries, and with its own staff. The bill to restructure the Commission became law without any amendment to what is now section 4(e); however, during hearings on the bill, Congress' intent that the Commission have the final licensing decision became manifest. (See Hearings on H.R. 11408 Before the House Committee on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 32,

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[46]Although in opposing the Indian consent amendment (discussed *supra*, at 14-16) Senator Walsh did argue that it was unnecessary because Interior could "veto" the use of reservation land (see 59 Cong. Rec. 1564, 1568 (1920)), Senator Meyers placed these comments in perspective when he stated:

> "It is Interior's sworn duty to seek the views of the Indians and to consider them and to give them great weight and to take the views of the Indians into consideration in determining a matter affecting their welfare, *along with all other factors that are entitled to consideration*.
>
> . . .
>
> [I]f he thinks an application for a permit which affects land owned by Indians is not fair and right and reasonable I have no doubt he will resist it; *and if he thinks it intended for a use to which the public is entitled, I have no doubt that any Secretary of the Interior would consent that it be granted only upon the*

48-49 (1930) (remarks of Secretaries Wilbur and Hyde))

In Senate hearings, the Commission's chief counsel, James Lawson, made clear the Commission's independence:

> "The pending bill (S.3619) provides for an independent commission and, in my judgment, that plan should not be departed from. The proposal to create a commission composed of Undersecretaries of the three departments would leave us with a commission subject to political control and would not be compatible with the public interest to be served.
>
> . . .
>
> If the decisions of the commission are to be made by order of, or subject to review by the heads of the departments, you will have complicated and not simplified the administration of this important statute.
>
> . . .
>
> *The commission now has power to override the head of a department as to the consistency of a license with the purpose of any reservation.* Power sites are also reservations. *I would be unable to follow the logic which made the protection of a thousand dollars worth of timber land of more importance than the proper utilization of a hundred thousand dollar power site.*" (Hearings Pursuant to S. Res. 80 and on S. 3619 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess. 358 (1930))

Congress could not have intended that by using the word "shall" that the Commission had to accept a Secretarial condition that would prevent the licensing of a valuable project. More likely, in light of the fact that the Commission originally was composed of the three Secretaries, Congress believed that they would coordinate their activities while according a particular Secretary a reasonable amount of comity where a project primarily impacted on a reservation within his jurisdiction. Where a Secretary proposed a "reasonable" condition that would protect his interests without thwarting the Commission's overall goal of water-power

development, Congress probably did believe that such a condition "shall" be included. It is certain, however, that Congress did not intend that narrow departmental interests predominate over the broad public interests in a licensing decision.

C. THE COMMISSION CONSISTENTLY HAS INTERPRETED THE FPA AS MANDATING THE INCLUSION OF ONLY THOSE SECRETARIAL CONDITIONS IT DEEMS REASONABLE.

The Commission always has interpreted section 4(e) to require only those conditions which it deems reasonable and in the public interest. In *Pigeon River Lumber Co.* (1935) 1 FPC 206, The Commission rejected Interior's contention that the issuance of a preliminary permit would be a futile act "because of the conditions which the Secretary would feel impelled to include in the license for the protection of the Indians." (*Id.* at 209)

However, the Commission indicated that in making its section 4(d) [now 4(e)] findings it would "give great weight to the judgment and recommendation of the custodian of the rights and welfare of the Indians." (*Ibid.*)[47]

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[47]See also *Pacific Gas & Electric Co., Project 1962* (1947) 6 FPC 729, 730 (Commission rejected conditions "recommended" by Agriculture for the protection of fish); *Southern California Edison Co., Project 1930* (1949) 8 FPC 364, 367-68 (Commission rejected condition recommended by Agriculture to require a minimum water flow); *Arizona Power Auth'y* (1968) 39 FPC 955, 960 (Commission rejected condition that would have required secretarial approval of changes in annual charges or use of Indian water); *Pacific Gas and Electric Co.* (1975) 53 FPC 523, 526 (Commission refused to include conditions proposed by Secretary of Agriculture in relicensing decision); *Montana Power Co., Project No. 2301* (1976) 56 FPC 2008, 2011-12 (Commission rejected condition requested by Agriculture that a license term be limited to twenty years); *Northern States Power Co., Project No. 108* (1980) 13 FERC ¶61,055 at 61,114. "[A] new license may be issued without the Band's consent, and without including conditions recommended by Interior."

The Commission also has denied Interior a veto over the fixing of annual charges for the use of Indian lands under section 10(e). (See, *e.g., Montana Power Co. v. Federal Power Comm'n* (1971 D.C. Cir.) 459 F.2d 863, 874, *cert. denied* (1972) 408 U.S. 930)

Courts have implicitly recognized this longstanding practice by referring to proposed secretarial conditions under section 4(e) in terms of "recommendations" (see, *e.g.*, *Idaho Power Co. v. Federal Power Comm'n* (1965 9th Cir.) 346 F.2d 956, 958, *cert. denied* (1965) 382 U.S. 957), and "suggestions." (See, *e.g.*, *Federal Power Comm'n v. Idaho Power Co.* (1952) 344 U.S. 17, 19, *reh'g denied* (1952) 344 U.S. 910)

The Commission's consistent and reasonable interpretation of its own Act is entitled to great deference. (See, *e.g.*, *American Paper Inst., Inc. v. American Electric Power Service Corp.* (1983) ___ U.S. ___, 76 L.Ed.2d 22, 38-39)

D. THE REASONABLENESS OF ANY SECTION 4(e) CONDITIONS MUST BE DETERMINED BY THE COMMISSION.

All parties agree that the conditions to be included in the license must be "reasonable." The Ninth Circuit in denying that its holding would give Interior an unconditional veto, stated that any "conditions propounded by Interior will be subject to judicial review . . . " (PA 24)

The Court thus contradicted its own premise that section 4(e)'s plain language mandates the inclusion of all conditions in a license. If, in fact, section 4(e) mandates only the inclusion of "reasonable" conditions, then the real issue is who makes the initial determination of reasonableness — the Commission or the appellate court.[48]

Common sense dictates that the Commission make the initial determination whether a secretarial condition should

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[48]Humpty Dumpty's observation could not be more apt:

"When I use a word," Humpty Dumpty said, rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

L. Carroll, *Through the Looking-Glass*, ch. 6 quoted in J. Bartlett, *Familiar Quotations* 746 (14th ed. 1968).

be included. As Judge Anderson noted:

> "I would place the initial reasonableness decision on FERC, for it is, after all, the forum in which the initial factfinding function is vested. [citation omitted.] FERC's written findings of fact and supporting reasoning would then be subject to review in the court of appeals. I believe this procedure would preserve the control of FERC over licensing, and at the same time respect the Secretary's statutory duty to protect the reservations." (PA 41)

E. THE COMMISSION LACKS AUTHORITY TO INCLUDE INTERIOR'S CONDITIONS WITHOUT MODIFICATION.

The Bands' major purpose in this proceeding was to obtain a license to operate Project No. 176 as a nonpower project under section 15. The Bands' proposal was inferior to Petitioners' in many respects (see PA 92-109); however, one of the primary problems was the Bands' inability to establish adequate water rights to operate the project. (See PA 98-109)

Interior's conditions were designed to force Petitioners to: (1) provide the Bands with the very water rights to which they could not establish title; and (2) operate the project for the Bands' benefit under essentially the same nonpower regime as that proposed by the Bands. What the Bands were unable to obtain by merit, Interior attempted to obtain for them by arbitrary fiat, using the proviso of section 4(e) as a subterfuge.

The Commission lacked authority to insert Interior's conditions because their inclusion would have violated: (1) section 27 which prohibits the Commission from adjudicating water rights; and (2) the Commission's duty under section 10(a) to adopt the project that was in the public's best interest.

1. Interior's Conditions Are an Impermissible Attempt to Adjudicate Water Rights Within a Commission Proceeding.

Section 27[49] bars the Commission from adjudicating water rights. (See, *e.g.*, *First Iowa, supra*, 328 U.S. at 178) Notwithstanding its bar, the Bands and Interior attempted to use Interior's section 4(e) conditions to obtain the water rights which are being litigated in federal district court.

The Bands admitted that they needed Petitioners' water rights and, particularly Henshaw's storage, in order to operate their proposed nonpower regime. (See remarks of Bands' hydrology expert, Mr. Stetson (COR 7816-17), and staff counsel Mr. Woods. (*Id.* at 7818))

When Vista's attorney, Mr. Wright, observed that Interior's conditions would give the Bands the entire natural flow in the river (JA 165-68), Mr. Chambers, Interior's spokesman, did not dispute the observation, but instead attempted to justify the result. (JA 168-71)

Interior contended that even if Mutual's and Vista's water rights were adjudicated to be superior to those of the Bands, it could nonetheless unilaterally impose conditions on the renewal of the license which would take those water rights and give them to the Bands — conditions which would in effect reverse the water rights adjudication of the District Court. (See remarks of Chambers, JA 176) Interior reaffirmed its position in its revised conditions. (JA 238-42) In its accompanying letter (JA 218-37) Interior stated:

> "Even if the water belongs to Mutual (and Vista), the Department and the Commission may impose conditions that derogate from and infringe upon their rights

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[49]Section 27 (PA 387-88) provides:

"Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

in return for the privilege of utilizing Indian and public lands." (JA 225)

The Commission understood Interior's purpose:

"Although the Bands and Interior expressly 'acknowledge that the Commission is without jurisdiction to adjudicate the merits of the existing water rights controversy between the Bands and Mutual and Vista', nonetheless, they seem to say indirectly that the Commission is bound to do so. . . . (PA 105-06)

. . .

We find that many of the arguments are directed toward imposing license conditions for providing water to the Bands. . . . (*Id.* at 106 n.101)

. . .

The Commission was not intended to be, and is not, a forum for litigating disputed water rights." (*Id.* at 108)

2. The Inclusion of Interior's Conditions Would Contravene the Commission's Duty Under Section 10(a).

Section 10(a) requires the Commission to adopt the project which in its judgment "is best adapted to a comprehensive plan . . . for the improvement and utilization of waterpower development, and for other beneficial public purposes. . . ." (PA 382) After comparing the competing proposals presented by the Bands and Petitioners, the Commission concluded that Petitioners' project was "best adapted" within the meaning of section 10(a). (PA 119 ("Our decision is premised upon superiority under sections 10(a) and 7(a) of the joint Mutual Escondido application."))

Notwithstanding the superiority of Petitioners' proposal, Interior determined that it could impose conditions in the license that would force it to be operated in a manner similar to the Bands' proposal. In effect, Interior proposed to usurp the Commission's authority under section 10(a) and substitute its own judgment as to the relative merits of the

competing license applications.[30]

The Commission understood the purpose behind Interior's conditions:

> "If the Commission were required to include those conditions in the license issued herein, it would be unable to exercise its judgment and authority under section 10(a) to reshape Mutual's and Escondido's joint licensing proposal into the project which is best adapted to a comprehensive plan for beneficial public uses." (PA 147)

F. IN ANY EVENT THE FPA DOES NOT REQUIRE THE IMPOSITION OF SECRETARIAL CONDITIONS IN A RELICENSING SITUATION.

Even if the Ninth Circuit were correct in its interpretation of section 4(e), the inclusion of secretarial conditions in this case would not be mandatory because this was a relicensing

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[30]As the ALJ noted:

> "It is manifest the conditions were designed not to improve the project but to destroy it. The joint brief at page 63 seems to confess as much, saying their net effect is to 'resemble the operations under the nonpower license or recapture alternative, for that is the only way to assure the adequate protection and utilization of the reservation.'
>
> If that sort of approach is what the conditioning requirement of section 4 contemplates, i.e., a Secretarial veto, made confessedly with total disdain for the survival of the project itself and for the law's standard of comprehensive development, then this six-year proceeding has been an expensive waste of time; no room remains for the Commission's judgment; and, if it were to become the custom in other cases, the hydro power potentialities of the nation's many reservations cannot contribute to the national need nor can their avails be realized for the Indians' benefits. The result can only be to nullify the project and deprive the Bands of a very valuable and profitable resource." (JA 300-01)

The proposed conditions had been prepared in concert by the Bands and Interior. (NJA 4366-67) Since they argued that Interior had an absolute right to impose the conditions (NJA 4356), the ALJ was also concerned that:

> "[T]he judge of this case, the decider of this case, is one of the litigants, the Secretary. . . . How can the parties on both sides feel they are fairly treated when it turns out that the judge is the opposition party? That part worries me, and I can't quite see the answer." (NJA 4364)

proceeding under section 15 — not section 4(e).[51]

The FPA establishes two separate licensing schemes: a procedure for issuing an original license under section 4(e); and a procedure under section 15 for issuing a new license after an original license expires. (See *Pacific Gas & Electric Co.* (1975) 53 FPC 523, 526 ("New licenses are issued under section 15 rather than section 4(e).""))

The Ninth Circuit totally ignored section 15. Although issuance of an original license under section 4(e) permits affected Secretaries to propose conditions for insertion in the license, section 15 makes no such requirement with respect to the issuance of any new license. The FPA's legislative history gives no indication that section 4(e)'s conditions proviso applies on relicensing under section 15. (See *Harrison v. PPG Ind., Inc.* (1980) 446 U.S. 578, 592 ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.""))

A common sense reading of the Act compels the conclusion that the findings and conditions in section 4(e) were to be a one-time requirement upon issuance of an original license.

The reason Congress did not require section 15(a) licenses to meet section 4(e) requirements is obvious when one considers the practical distinctions between the two situations.

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[51]Petitioners disagree that the action "is partly an initial licensing of the Henshaw facilities and partly a relicensing of the presently licensed Project No. 176 facilities." (PA 136) With the exception of minor acreage under separate permit from Forestry (PA 58), no additional public lands or reservations are involved as all Henshaw lands are owned by Vista.

Commission proceedings were always treated as a relicensing. Since 1974 Mutual has operated the project with annual licenses issued under section 15(a). (See 51 FPC 1610 (1974)) The Commission rejected Interior's take-over recommendation under section 14 (PA 109-16), and on rehearing determined net investment and severance damages. (PA 312-27) The "new" (not "initial") license issued to Petitioners was "for the continued operation and maintenance of Escondido Project 176." (PA 253)

When an applicant applies for an original license, there has not been a substantial financial investment and no consumer reliance on the project has developed. At that stage, if the Commission seeks to impose onerous conditions, the applicant can reject them and if the proposal interferes with a particular reservation, the project will not move forward. The situation on relicensing is quite different. In such a case, there already has been a finding that the project will not interfere with the reservation in question; the applicant has accepted the proposed conditions and built the project; the public has become dependent on its benefits' and the only real question is who should operate the project, the existing licensee, the United States or a competing applicant. Since this is a relicensing case under section 15(a), a Secretarial veto is inapplicable.

IV.

THE NINTH CIRCUIT'S HOLDING THAT "WATER RIGHTS" ARE A "RESERVATION" FOR SECTION 4(e) PURPOSES IS A STRAINED AND UNNECESSARY INTERPRETATION THAT JEOPARDIZES ALL FEDERAL POWER PROJECTS.

The Ninth Circuit held that Interior's conditions also must be imposed with respect to the Indian reservations which "may be affected by the project." (PA 25)

Its strained interpretation of "reservation" conflicts with both the clear language of the statute and longstanding Commission interpretation. It is unnecessary because Indian water rights are fully protected in other ways.

A. THE NINTH CIRCUIT'S INTERPRETATION IS INCONSISTENT WITH BOTH THE STATUTORY LANGUAGE AND THE COMMISSION'S LONGSTANDING INTERPRETATION OF IT.

Section 4(e) authorizes the construction of power projects "*upon* . . . reservations of the United States" and states that "licenses shall be issued *within* any reservation." (PA

381) Section 3(2) defines "reservations" to include "tribal lands embraced *within* Indian reservations." (PA 380)

The Court conceded "that the word 'within' tends to paint a geographical picture in the mind of the reader." (PA 26) Certainly if Congress had intended the result that the Court strained to reach, it simply would have added the words "or affecting" following the word "within".

The Commission always has limited application of section 4(e) to projects "within" the physical boundaries of a reservation. (See, *e.g., Pigeon River Lumber Co.* (1935) 1 FPC 206, 207 (dams outside of Indian reservation did not affect government lands); *City of Seattle, Department of Lighting, Project No. 533* (1977) 59 FPC 196, 12 FPS 5-514, 531 (tribal fishing rights not a "reservation."))[52]

Recognizing the awkwardness of its interpretation, the Court purported to find "a possible ambiguity" in the statute that should be "resolved" in favor of the Indians. (PA 27) Its interpretation extends the FPA far beyond Congressional intent (see, *e.g., NAACP v. FPC* (1976) 425 U.S. 662), and ignores the Commission's longstanding interpretation. It also ignores the rule that statutes are not construed in favor of the Indians where intended to achieve other purposes and do not require Indian consent. (See *United States v. First National Bank* (1914) 234 U.S. 245, 259)[53]

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[52]The Court's definition of "reservation" also conflicts with *Tuscarora, supra*, where the Court stated that Congress:

> " '[F]or purposes of this Act' " (§3(2)), intended to and did *confine* "reservations", including "tribal lands embraced within Indian reservations" (§3(2)), to those located on *lands* "owned by the United States" (§3(2)), or in which it owns a proprietary interest." (362 U.S. at 114)

Clearly the lands in question in *Tuscarora* would have been "affected" by the Project; nevertheless they were not within the definition of "reservation" because they were owned "in fee" and not by the United States.

[53]See also *De Coteau v. District County Court* (1975) 420 U.S. 425, 447 ("A canon of construction [requiring resolution of ambiguities in favor of Indians] is not a license to disregard clear expressions of . . . congressional intent.")

B. IT WAS UNNECESSARY FOR THE NINTH CIRCUIT TO DISTORT THE MEANING OF THE FPA IN ORDER TO PROTECT INDIAN WATER RIGHTS.

The Court worried that a project could turn "a potentially useful reservation into a barren waste without even crossing it in a geographical sense . . . [and would] not attribute to Congress . . . [such a] perverse and illogical intention. . . ." (PA 28) This concern is wholly unjustified. For a project to have such dire consequences, the Commission would have to ignore the project's harmful effects[54] and the Courts would have to refuse to protect Indian water rights.[55] Nothing in the history of this or any other federal water power project warrants such speculation.

The Commission cannot adjudicate water rights (see discussion, *supra*, at 40-41); protection of the right to "an allotment of water necessary to make the reservation livable," is a judicial function. (*State of Arizona v. State of California* (1983) ___ U.S. ___, 75 L.Ed.2d 318, 331 (quoting from *State of Ariziona v. State of California* (1963) 373 U.S. 546, 599-600); see also *Winters v. United States* (1908) 207 U.S. 564.)

Conclusion.

The Ninth Circuit's section 4(e) and MIRA section 8 holdings give the Bands and Interior a veto over the relicensing of Project No. 176 — a project that has served Escondido and its surrounding communities for over sixty years. Moreover, its sweeping definition of the word "reservation" makes most federal hydro-electric projects subject to an Indian or Secretarial veto.

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[54]The Commission did not ignore the Pala, Pauma and Yuima Reservations. It required the licensees to fulfill all valid contracts to supply electric power and water to them. (PA 219-21) The Commission also indicated that it might impose additional requirements consistent with the final disposition of the district court litigation. (PA 334; see also PA 190)

[55]As discussed *supra*, note 4, the water rights of all the parties are being adjudicated in the federal courts. See also PA 366 n.51.

As a result the Ninth Circuit decision may well destroy Project 176 — a project which the Commission found "best adapted to a comprehensive plan for public users. . . ." (PA 130) and more importantly, cripple all future hydroelectric development in the West.[56]

The Court should reverse and rule: (1) MIRA section 8 does not require the Bands' consent to the use of their lands for Project 176; (2) FPA section 4(e) requires the Commission to include only these secretarial conditions that it deems reasonable; and, (3) the Pauma and Pala reservations, including the Yuima tracts, are not "reservations" under section 4(e).

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Respectfully submitted,

PAUL D. ENGSTRAND,
DONALD R. LINCOLN,
HENRY E. HEATER,
JENNINGS, ENGSTRAND & HENRIKSON,
A Professional Law Corporation,
LEROY A. WRIGHT,
KENT H. FOSTER,
GLENN, WRIGHT, JACOBS & SCHELL,
C. EMERSON DUNCAN II,
DUNCAN, ALLEN & MITCHELL,
Attorneys for Petitioners.

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[56]As pointed out in Petitioners' Reply Brief (PRB) on Petition for Writ of Certiorari (PRB 2-6), as many as 150 projects are located on Indian reservations or alleged to adversely affect their water and fishing rights. Further, 606 projects utilize federal lands and reservations. (Pet. 7 n.12; see also PRB 5 n.6) Each project could be frustrated either by an Indian veto, based for example on alleged treaty fishing rights, or by a departmental head whose narrow view of the public interest might be limited to timber management or white water rafting.

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